

APPEAL NO. 042267  
FILED NOVEMBER 2, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 28, 2004, with the record closing on August 17, 2004. The hearing officer determined that the respondent's (claimant) impairment rating (IR) is 25% as assessed by the designated doctor whose report was not contrary to the great weight of the other medical evidence.

The appellant (carrier) appeals, contending that the Texas Workers' Compensation Commission (Commission) Executive Director exceeded his authority in issuing Advisories 2003-10, signed July 22, 2003 and 2003-10B, signed February 24, 2004, and that the claimant's 25% IR was not based on his condition at the time of maximum medical improvement (MMI). The file does not contain a response from the claimant.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable (low back) injury on \_\_\_\_\_, that Dr. M is the properly appointed designated doctor, and that the claimant reached MMI on November 20, 2003 (pursuant to Section 401.011(30)(B)). It is also undisputed that the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides) is the applicable edition to be used. It is relatively undisputed that the claimant had spinal surgery in the form of an anterior and lumbar decompression and fusion from L4 to S1 on August 11, 2003. In a report dated November 20, 2003, Dr. K, the surgeon, states that the claimant "clearly fits into a Diagnosis-Related Estimate (DRE) Lumbosacral Category III for radiculopathy." The hearing officer comments, and is supported by the evidence, that the surgeon's rating was invalid "because [he] was not on the Commission's Approved List at the time of the rating."

Subsequently, Dr. M was appointed as the designated doctor. In a report dated February 26, 2004, Dr. M assessed a 25% IR stating:

Upon review of the medical records and physical examination, the examinee shows clinical evidence of lumbosacral injury with loss of motion segment integrity due to multi-level fusion at L4/5 and L5/S1. The examinee also shows clinical evidence of lumbosacral injury with bilateral L4, L5 and S1 radiculopathy. Based on Table 72, DRE Category V, page 110, he is assigned a 25% whole person impairment due to this condition.

This rating was challenged based on a peer review report and Dr. M was asked for a letter of clarification. In a report dated April 7, 2004, Dr. M replied:

In regard to [the claimant]'s [IR], it is true that the AMA Guides, Fourth Edition does not indicate that a two-level fusion meets the criteria for awarding for a DRE Category IV or V. In fact, the definition for loss of motion segment integrity can be found on Page 98 of the Guides. However, in addition to the AMA Guides, the TWCC provided Advisory 2003-10 from July 22, 2003, and Advisory 2003-10B from February 24, 2004, which indicate that a multilevel fusion meets the criteria for a DRE Category IV, as it is equivalent to "multilevel spine segment structural compromise."

In addition Dr. M stated that he was to "also follow the directive of the TWCC."

DRE Lumbosacral Category V: Radiculopathy and Loss of Motion Segment Integrity has as description and verification that: the "patient meets the criteria of DRE Lumbosacral Category III and DRE Lumbosacral Category IV, that is, both radiculopathy and loss of motion segment integrity are present."

At the CCH, the carrier contended that it believed that Dr. M thought that he was required to apply Advisory 2003-10 and 2003-10B. The hearing officer kept the record open and wrote Dr. M by letter dated July 28, 2004, explaining in some detail that the advisories "are written as advisories and not directions" and "are not rules or laws, but to be only considered and that the option (to apply the advisories) was up to the doctor. Dr. M responded that the claimant "was appropriately awarded a 25% whole person impairment from Table 72, DRE Category V" based on the advisories and his examination. Regarding the loss of motion segment integrity, Dr. M writes:

My statements regarding the lumbar x-rays from 11/29/02 were on the basis of the report, as the actual films were not available for my review. One must have lateral flexion/extension films to completely verify motion segment integrity loss. If these films were not completed preoperatively, then at this point they would not be of benefit, as has been fused, which one would expect him to not have any movement at the fused levels at this time.

The hearing officer determined that the designated doctor's 25% IR was not contrary to the great weight of other medical evidence. The carrier contends that the Commission's Executive Director exceeded his authority in issuing the advisories. In Texas Workers' Compensation Commission Appeal No. 041429-s, decided August 4, 2004, we stated that it is not the function of the Appeals Panel to pronounce on the validity of Commission advisories. If, or when, the subject advisories are withdrawn or superseded by controlling legal authority, we will apply the law as directed. See *also* Texas Workers' Compensation Commission Appeal No. 042108-s, decided October 20, 2004.

The carrier also complains that the designated doctor's IR "is erroneous" because it did not reflect the claimant's status at the date of MMI. The claimant, by stipulation reached MMI on November 20, 2003. Dr. M's initial report was February 26, 2004. There is no evidence that there was a change in status or that the designated doctor did not do his assessment based on the MMI date that he was given.

We have reviewed the complained-of determinations and conclude that the hearing officer correctly applied the 1989 Act, and AMA Guides, and that his determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**LEE F. MALO  
12222 MERIT DRIVE, SUITE 700  
DALLAS, TEXAS 75251.**

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Gary L. Kilgore  
Appeals Judge

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Veronica L. Ruberto  
Appeals Judge